

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 20, 2007

STATE OF TENNESSEE v. LARRY ARNOLD

**Direct Appeal from the Criminal Court for Davidson County
No. 2005-C-2485 Steve Dozier, Judge**

No. M2006-01287-CCA-R3-CD - Filed June 27, 2007

The defendant, Larry Arnold, appeals as of right from his conviction of burglary for which he received a sentence of seven years imprisonment as a Range II, multiple offender. In this appeal, the defendant challenges the sufficiency of the convicting evidence and the length of his sentence. Following our review of the record and the parties' briefs, we affirm the defendant's conviction and sentence.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and THOMAS T. WOODALL, J., joined.

Jeffrey A. DeVasher (on appeal) and C. Dawn Deaner (at trial) Assistant Public Defenders, Nashville, Tennessee, for the appellant, Larry Arnold.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The evidence presented by state witnesses at trial is as follows. On April 28, 2005, at 1:07 a.m., a burglar alarm monitoring company notified police of an alarm activation at the Jasmine Salon in Nashville. Five minutes later, Metro Police Officer Dylan Kinney arrived at the salon. Upon his arrival, Officer Kinney noticed that the lock on the back door of the salon had been broken and the back door was open. While Officer Kinney was calling for assistance, he heard the breaking of glass near several utility vehicles, which were parked in a driveway behind the salon. Officer Kinney drew his gun and walked towards the sound of glass breaking. Thereafter, Officer Kinney discovered the defendant behind one of the utility vehicles. The defendant was holding a "gumball" type vending

machine upside down and shaking coins and M&M candies from the machine. Officer Kinney ordered the defendant to come out from behind the vehicle, but the defendant ran away. After a brief foot chase, the defendant was wrestled to the ground and arrested. Some 215 quarters and 2 M&M candies were found on the defendant's person. 481 quarters were collected from the ground where the defendant was first seen by Officer Kinney. After the defendant was taken into custody, the owner of the Jasmine Salon took inventory of the salon and reported that his gumball machine was missing from the salon.

The defendant testified on his own behalf. According to the defendant, he was homeless and sleeping in an abandoned utility vehicle parked behind the salon. On the night of the burglary, he was awakened by the sound of glass breaking. He got up and saw a man holding a gumball machine and beating the machine against the ground. The man told him the police were about to arrive and fled the parking area, leaving the gumball machine behind. The defendant then picked up the machine and began to shake it in an attempt to dislodge quarters from it. While he was filling his pockets with quarters, Officer Kinney shined a flashlight in his eyes and said, "show me some hands." The defendant did not comply with the order but instead ran away. The defendant claimed that it was dark and he did not see that Officer Kinney was a police officer. The defendant acknowledged that he had prior convictions for theft-related offenses.

ANALYSIS

I. Sufficiency

The defendant first challenges the sufficiency of the convicting evidence. Specifically, the defendant asserts that the evidence presented was entirely circumstantial and therefore insufficient to sustain a conviction for burglary.

Upon review, we reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); see Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's

inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

Relevant to this case, a person commits burglary who, without the effective consent of the property owner, enters a building and commits or attempts to commit a theft. *See* Tenn. Code Ann. § 39-14-402. The guilt of the defendant as well as any fact required to be proved may be established by direct evidence, by circumstantial evidence, or by a combination thereof. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). In fact, a criminal offense may be established exclusively by circumstantial evidence so long as the evidence excludes all other reasonable theories except that of the defendant's guilt. *See State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971). In other words, “[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.” *Id.* at 613.

Taken in the light most favorable to the state, the evidence established that a burglary of the Jasmine Salon was reported to police. Less than ten minutes after the burglary had been reported, the defendant was found removing quarters from a gumball vending machine. The defendant was in close proximity to the salon when he was discovered with the gumball machine. The defendant ran from the police after being told to stop. The back door of the salon showed signs of a break-in, and a gumball machine was reported stolen from the salon. While the defendant testified that he did not break into the salon, we reiterate that this court must presume the jury resolved all conflicts in the testimony and drew all reasonable inferences in favor of the state. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Accordingly, we conclude that the jury could properly reject the defendant’s testimony as not credible, and based on the circumstantial evidence presented, the jury could reasonably find the defendant guilty of burglary beyond a reasonable doubt. The defendant is not entitled to relief on this issue.

II. Sentencing

The defendant next challenges the length of his sentence of seven years as excessive. Specifically, the defendant submits that the trial court’s utilization of his criminal record to determine both his range and length of sentence in the range was improper because it resulted in a sentence “greater than that deserved for the offense committed.”

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401. This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence

is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); *see also* Tenn. Code Ann. § 40-35-210(f).

Before a trial court sentences a convicted defendant, it must consider: (1) the evidence received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the arguments of counsel relative to sentencing alternatives; (5) the nature and characteristics of the criminal conduct involved; (6) any mitigating or enhancement factors; (7) any statements made by the defendant in his or her own behalf; and (8) the defendant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210; *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is also required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated in determining the sentence. *Imfeld*, 70 S.W.3d at 704-05.

In the instant case, the defendant stipulated to his status as a Range II, multiple offender; therefore, the defendant was subject to a sentencing range of four to eight years for his burglary conviction. *See* Tenn. Code Ann. §§ 39-14-402(c), 40-35-112(b)(4). The defendant acknowledged that he had been addicted to crack cocaine, but maintained he had been clean since his arrest. The defendant stated that he had been admitted to a mission program and had pending employment.

In arriving at a sentence of seven years, the trial court considered the defendant's criminal history and the defendant's failure to comply with the conditions of a sentence involving release into the community. *See id.* § 40-35-114. The trial court noted that the defendant had an extensive criminal history with approximately forty-four misdemeanors, thirty-three of which were theft or trespass related. Therefore, the trial court gave the "greatest weight" to the defendant's criminal record. The trial court also considered mitigating factors that the defendant's conduct neither caused nor threatened serious bodily injury, and that the defendant was motivated by a desire to provide necessities for himself. *See id.* § 40-35-113. However, the court gave these factors minimal weight given the fact that the defendant ran away from police and had to be wrestled to the ground, and the defendant admitted to being motivated to steal because of a cocaine addiction rather than a need to provide necessities for himself.

A review of the record indicates that the trial court considered the sentencing principles and the relevant facts and circumstances attendant to the imposition of the defendant's seven year sentence. In addition, the record supports the court's findings and decision. If our review reveals that the trial court complied with the statutory sentencing procedure, and the court's findings are supported by the record, we cannot disturb the sentence even if we would have preferred a different result. *See State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). Accordingly, the defendant is not entitled to relief on this issue.

J.C. McLIN, JUDGE